

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CHARLES GRAY PAYNE,)	
)	
Petitioner,)	
)	
v.)	1:09CV719
)	
ALVIN W. KELLER, JR.,)	
)	
Respondent.)	

MEMORANDUM OPINION AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This case comes before the undersigned United States Magistrate Judge on Petitioner's pro se letter motion (Docket Entry 16) requesting "voluntary dismissal" of this action (id. at 2). (See Docket Entry dated Feb. 1, 2012.) For the reasons that follow, the Court should deny Plaintiff's instant letter motion.

BACKGROUND

Plaintiff instituted this action under 28 U.S.C. § 2254. (See Docket Entry 1.) Respondent filed an answer and moved to dismiss on statute of limitations grounds. (See Docket Entries 5-7.) After the Clerk's Office gave Petitioner notice of his right to respond (see Docket Entry 8), the undersigned Magistrate Judge issued a Recommendation that the Court grant Respondent's dismissal motion (see Docket Entry 12). Petitioner timely objected. (See Docket Entry 14.) While those objections remained pending before the assigned United States District Judge, Petitioner filed the

instant letter motion (see Docket Entry 16) and Respondent responded in opposition (see Docket Entry 17).

DISCUSSION

In general, the Rules Governing Section 2254 Cases apply to cases brought under Section 2254. See Rule 1(a), Rules Governing Sect. 2254 Cases. However, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or [the Rules Governing Section 2254 Cases], may be applied to a proceeding under [the Rules Governing Section 2254 Cases]." Rule 12, Rules Governing Sect. 2254 Cases. Under the Federal Rules of Civil Procedure, where (as here) an answer has been filed, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Numerous courts have treated said Rule as applicable to actions under Section 2254. See, e.g., Hicks v. Glebe, No. C08-5672FDB, 2009 WL 2392150, at *2 (W.D. Wash. July 31, 2009) (unpublished); Baca v. Rider, No. CV-08-8030-PHX-GMS(MEA), 2008 WL 4905494, at *2 (D. Ariz. Nov. 13, 2008) (unpublished).

In this case, Petitioner sought voluntary dismissal only after the entry of a recommendation that the Court grant Respondent's motion to dismiss on statute of limitations grounds. "The Fourth Circuit has specifically held that a motion to voluntarily dismiss under Rule 41(a)(2) should be denied when a plaintiff seeks to circumvent an expected adverse result, and that 'denial of

voluntary dismissal is appropriate where summary judgment is imminent.'" Nesari v. Taylor, 806 F. Supp. 2d 848, 861 (E.D. Va. 2011) (quoting Skinner v. First Am. Bank of Va., No. 93-2493, 64 F.3d 659 (table), 1995 WL 507264, at *2 (4th Cir. Aug. 28, 1995) (unpublished)). In light of this authority, the Court should not allow Petitioner to avoid final adjudication of Respondent's motion to dismiss, particularly given the investment of time by both Respondent and the Court on that issue, prior to Petitioner's filing of his instant letter motion. See Miller v. Terramite Corp., 114 Fed. Appx. 536, 540 (4th Cir. 2004) (emphasizing that, by time plaintiff filed motion seeking voluntary dismissal, "the district court had invested a great deal of time preparing a dispositive order," in denying plaintiff's motion); Baca, 2008 WL 4905494, at *2 (declining to permit voluntary dismissal where "Petitioner ha[d] filed his motion to withdraw [Section 2254 Petition] only days before the Magistrate issued the R & R . . . [and] after Respondents expended significant time and effort in preparing their answer and response to the Petition").

IT IS THEREFORE RECOMMENDED that Petitioner's pro se letter motion (Docket Entry 16) be denied.

_____/s/ L. Patrick Auld_____
L. Patrick Auld
United States Magistrate Judge

April 16, 2012